Filed 1/16/09 P. v. Aquino CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ARMANDO AQUINO, Defendant and Appellant.	E045058 (Super.Ct.No. FVI026185) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Eric M. Nakata, Judge. Affirmed.

Phillip I. Bronson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Pamela Ratner Sobeck and David Delgado-Rucci, Deputy Attorneys General, for Plaintiff and Respondent.

The People charged defendant by amended information with petty theft with a prior, a felony (count 1—Pen. Code, § 666), being under the influence of a controlled substance, a misdemeanor (count 2—Health & Saf. Code, § 11550, subd.(a)), and possession of a device for smoking controlled substances, a misdemeanor (count 3—Health & Saf. Code, § 11364, subd. (a)). Prior to trial, defendant stipulated to the fact that he had a prior theft conviction for purposes of the count 1 offense. Prior to the completion of trial, defendant also admitted the truth of three prior strike convictions and four prior prison term allegations. The jury convicted defendant on all counts. The trial court sentenced defendant to 29 years to life, consisting of the following: 25 years to life on count 1; one consecutive year for each of the four prior prison terms; and time served on counts 2 and 3.

On appeal, defendant contends his 29-year-to-life sentence violates the federal and state constitutional proscriptions against double jeopardy because it was based primarily on past offenses for which he had already been punished. In addition, defendant maintains his sentence is violative of the federal and state constitutional prohibitions against cruel and/or unusual punishment.[1] We find defendant's sentence constitutionally valid and, therefore, affirm the judgment in full.

[1] Defendant also raises ineffective assistance of counsel claims in the event that this court finds that defendant forfeited either issue by failing to raise them below. In order to forestall those claims, we shall address the merits of both issues. (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.)

I. FACTUAL HISTORY

The victim permitted her daughter and defendant to borrow her truck. Inside the truck's glove compartment, the victim left eight cards with $20 apiece inside as Christmas gifts for her grandchildren. The victim's daughter returned the truck the next morning.

Approximately four days later, the victim noticed that all the Christmas cards were missing. In addition, a $25 DVD and an emergency kit were also missing from the truck. The sheriff's department was called and the victim made a report with sheriff's deputies. She reported to the responding officers that defendant and her daughter had borrowed the truck a few days earlier.

Two deputies went to defendant's home in order to investigate the theft. They received permission to enter the residence from defendant's parents. They knocked on defendant's bedroom door, defendant opened the door, and the deputies entered defendant's room. One deputy immediately noticed a glass pipe used for smoking methamphetamine in plain view on defendant's bed. Defendant identified the pipe as his own. Defendant also displayed symptoms of being under the influence of a controlled substance. The deputy placed defendant under arrest for narcotics violations. The deputy later arranged to have defendant's blood drawn. Defendant's blood tested positive for recent use of methamphetamine.

After reading defendant his *Miranda*[2] advisements, the other deputy questioned defendant regarding the missing Christmas cards. Defendant responded that he found the cards in the truck's glove box, took the money out of all of them, and used it to purchase methamphetamine. Defendant also said he traded the DVD and, possibly, the emergency kit for additional methamphetamine.

II. DISCUSSION

A. *Double Jeopardy Clause*

Defendant contends the state and federal constitutional prohibitions against double jeopardy prohibit imposition of defendant's 25-year-to-life sentence under the "Three Strikes" law. Defendant argues that the sentence constitutes punishment for his past strike offenses, not for his current petty theft offense. We disagree.

The double jeopardy clause does not prohibit the imposition of enhanced punishment under a recidivist statute. (*Witte v. United States* (1995) 515 U.S. 389, 400; *People v. White Eagle* (1996) 48 Cal.App.4th 1511, 1520.) "Recidivist statutes do not impose a second punishment for the first offense in violation of the double jeopardy clause of the United States Constitution. [Citation.] Moreover, the double jeopardy clause does not prohibit the imposition of multiple punishment for the same offense where the legislature has authorized multiple punishment." (*White Eagle v. United States, supra,* at p. 1520.)

---

[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

In support of defendant's double jeopardy objection, defendant cites *People v. Carmony* (2005) 127 Cal.App.4th 1066, 1080 (*Carmony*), in which the court stated: "Past offenses do not themselves justify imposition of an enhanced sentence for the current offense. [Citation.] The double jeopardy clause prohibits successive punishment for the same offense. [Citations.] The policy of the clause therefore circumscribes the relevance of recidivism. [Citations.] To the extent the 'punishment greatly exceeds that warranted by the aggravated offense, it begins to look very much as if the offender is actually being punished again for his prior offenses.' [Citation.]" Defendant further cites *Duran v. Castro* (E.D. Cal. 2002) 227 F.Supp.2d 1121, 1130 (*Duran*), for a similar proposition: "[G]iven the strictures of the Double Jeopardy Clause, recidivism may be taken into consideration in the sentencing decision only to the extent that it serves to aggravate the principal offense." "[A] recidivism enhancement cannot be treated as an element of the offense without running afoul of the Double Jeopardy Clause." (*Id.* at p. 1131.)

Nevertheless, while both courts loosely peppered their analyses with double jeopardy terminology, both decided their respective cases on the grounds of cruel and unusual punishment. (*Carmony*, *supra*, 127 Cal.App.4th at p. 1089; *Duran*, *supra*, 227 F.Supp.2d at p. 1136.) "'[I]t is axiomatic that cases are not authority for propositions not considered. [Citations.]' [Citation.]" (*Gomez v. Superior Court* (2005) 35 Cal.4th 1125, 1153.) Thus, neither case stands as authority for the proposition that a three strikes sentence may be violative of double jeopardy proscriptions.

Both courts recognized that recidivists could be punished more severely than first time offenders without violating the prohibition against double jeopardy. (*Duran, supra,* 227 F.Supp.2d at pp. 1129-1130; *Carmony, supra,* 127 Cal.App.4th at p. 1079.) Moreover, as defendant acknowledges, *Duran* relied on the Ninth Circuit's opinion in *Andrade v. Attorney General of State of California* (*Andrade*) (9th Cir. 2001) 270 F.3d 743, which was subsequently overruled in *Lockyer v. Andrade* (2003) 538 U.S. 63. *Andrade* was likewise based on Eighth Amendment cruel and unusual punishment grounds. Indeed, neither the provision against double jeopardy nor the Fifth Amendment are mentioned at all in the majority opinion (though the possible applicability of double jeopardy principles to the Three Strikes law was mentioned in a footnote of the dissent). (*Lockyer v. Andrade, supra,* at p. 81, fn. 2.) Finally, *Duran* noted that "[a] stiffened penalty is warranted [under a recidivist statute] 'only if the defendant's current offense involves a repetition of a particular offense characteristic, indicating that the defendant remains prone to that specific kind of antisocial activity.'" (*Duran, supra,* at p. 1130.) Here, defendant was convicted of petty theft after sustaining previous convictions for twice taking a vehicle without the owner's consent, twice committing robbery, committing attempted robbery, burglary, and receipt of stolen property. Thus, defendant continues to show a strong penchant for taking property which does not belong to him, making enhancement of his sentence under the recidivist Three Strikes law particularly appropriate. The imposition of defendant's current sentence, pursuant to the Three Strikes law, does not violate double jeopardy proscriptions.

B. *Cruel and/or Unusual Punishment*

Defendant next contends that his sentence of 25 years to life constitutes cruel and unusual punishment under the state and federal Constitutions.

Both the federal and state Constitutions require that the punishment fit the crime. Under the prevailing view, the Eighth Amendment of the federal Constitution is violated when a sentence is "'grossly disproportionate'" to the crime. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001.) Similarly, the California Constitution is violated when the punishment "is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted (*Lynch*).) Lengthy prison sentences imposed under a recidivist statute have long survived scrutiny under both Constitutions. (See, e.g., *In re Rosencrantz* (1928) 205 Cal. 534, 539-540; *People v. Weaver* (1984) 161 Cal.App.3d 119, 125.)

Under California's Three Strikes law, when the defendant has at least two prior strike convictions, the Legislature has set life sentences as the appropriate penalty for any current felony. (Pen. Code, §§ 667, subd. (e), 1170.12, subd. (c).) Under the statute, a 25-year-to-life prison sentence is imposed not only for the defendant's current felony, but also for his recidivism. (See *People v. Mantanez* (2002) 98 Cal.App.4th 354, 366; *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630.) A majority of our United States Supreme Court held that the federal Constitution contains a narrow proportionality principle that

only prohibits sentences that are grossly disproportionate. (*Ewing v. California* (2003) 538 U.S. 11, 23-24.)

In this case, the indeterminate sentence was appropriate based on defendant's current offense, his criminal history, and other individualized considerations. (See *People v. Dillon* (1983) 34 Cal.3d 441, 479; *In re Jorge G*. (2004) 117 Cal.App.4th 931, 954.) Defendant's criminal history goes back to 1982. He has sustained convictions for the unlawful taking or driving of a vehicle, receiving stolen property, burglary, robbery, and attempted robbery. That history includes at least one act of violence, the robbery conviction in which defendant utilized a knife. Defendant was on parole when he committed the instant offenses. Defendant was previously given the opportunity of having a prior strike conviction stricken. Neither defendant's age, 43 at the time of his offenses, nor his criminal history, has deterred his continuing criminal behavior. Although his current offense is nonviolent, when viewed in context with his criminal history, it is evident that defendant continues to present a danger to society.

Moreover, defendant's life sentence passes the three-prong test. "[C]ourts generally analyze three prongs when evaluating whether a given sentence is cruel and unusual: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for the same crime in other jurisdictions. [Citations.]" (*People v. Cuevas* (2001) 89 Cal.App.4th 689, 702.)

Regarding the first prong, defendant argues that his current offense "and the harshness of his three strike sentence raises an inference of gross disproportionality." However, we note that in *People v. Meeks* (2004) 123 Cal.App.4th 695, the court extensively analyzed both the federal cruel and unusual standard, and the state cruel or unusual standard, and concluded that a 25-year-to-life recidivist sentence for failure to register as a sex offender violated neither the federal nor the state standards. (*Id*. at pp. 706-710.) As the court noted, "[d]efendant's willingness to ignore his duty to register and thus ignore society's right to maintain some control over sexual offenders may seem 'de minimis' to him but does not seem so to a society seeking to protect itself from sexual predators." (*Id*. at p. 709.) Here, defendant's conduct was not as passive as merely failing to register as a sex offender. Rather, defendant took the active step of stealing from his girlfriend's mother. Thus, we agree with the *Meeks* court's analysis and find it equally applicable here.

Defendant again cites *Carmony* and *Duran* as support for his proposition that his sentence was cruel and/or unusual under both the state and federal Constitutions. However, the *Carmony* court strictly limited its holding to the facts of that case, noting "[w]e have no occasion to consider the appropriateness of a recidivist penalty where the predicate offense does not involve a duplicate registration." (*Carmony*, *supra*, 127 Cal.App.4th at p. 1073, fn. 3.) That "duplicate registration" concerned the defendant's failure to complete an annual registration requirement within five days of his birthday despite the fact that he had already registered at his current address only 30 days earlier.

(*Id*. at p. 1071.) The court found that the "defendant's offense was an entirely passive, harmless, and technical violation . . . ." (*Id*. at p. 1077.) As noted above, defendant's offense was hardly a passive, harmless, or technical violation of the law.

In *Duran*, the defendant was initially charged with petty theft with a prior and possession of heroin, but pled guilty to possession of heroin in exchange for the dismissal of the petty theft charge. (*Duran, supra,* 227 F.Supp.2d at p. 1124.) The trial court sentenced defendant to 25 years to life. (*Ibid*.) On petition for writ of habeas corpus to the federal district court, that court determined that defendant's offense of simple possession of heroin was a minor offense, that his sentence was grossly disproportionate to that offense, and that his prior convictions lacked the characteristics of the predicate offense. (*Id*. at pp. 1123, 1127-1132.) Thus, it remanded the matter for resentencing "in a manner consistent with the Eighth Amendment . . . ." (*Id*. at p. 1136.) As noted above, *Duran* relied on the Ninth Circuit's opinion in *Andrade, supra,* 270 F.3d 743, which was subsequently overruled in *Lockyer v. Andrade, supra,* 538 U.S. 63 [defendant's sentence of 50 years to life for two separate thefts of approximately $150 in videotapes was proper under the Eighth Amendment].) Here, defendant was sentenced to less than half the time as the defendant in *Andrade* for a theft offense of items valued more than the aggregate value of the thefts in *Andrade*. Thus, defendant's case is even less sympathetic. Moreover, defendant's prior convictions shared substantial characteristics with his current offense.

We recognize that the Ninth Circuit in *Ramirez v. Castro* (9th Cir. 2004) 365 F.3d 755, 757, found that the defendant's sentence of 25 years to life under California's Three Strikes law was grossly disproportionate to the offense he committed. The defendant was similarly sentenced as a recidivist after having committed a petty theft with a prior, a "wobbler" offense that can be punished as a felony or a misdemeanor. (*Id*. at p. 756.) Likewise, the same court in *Reyes v. Brown* (9th Cir. 2005) 399 F.3d 964 remanded the matter to the district court for further proceedings in order to develop the factual context of defendant's second prior strike conviction, *suspecting* that his sentence was "grossly disproportionate to the gravity of his triggering offense and criminal history . . . ." (*Id*. at pp. 969-970 & fn. 9.) Nevertheless, we note that the decisions of intermediate federal courts, even on federal questions, are not binding on this court. (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3; see also *Black v. Department of Mental Health* (2000) 83 Cal.App.4th 739, 747; *Gervase v. Superior Court* (1995) 31 Cal.App.4th 1218, 1228-1229.) Moreover, the defendants in both *Ramirez* and *Reyes* were convicted of only *one* current offense and had only *two* prior strike convictions. (*Ramirez v. Castro, supra,* at p. 756; *Reyes v. Brown, supra,* at p. 965.) As discussed above, defendant had *three* prior strike convictions and was convicted of *three* counts in the current matter. Defendant's sentence is proportional to the gravity of his current offenses and his criminal history; therefore, his sentence is violative of neither the federal nor state constitutional provisions against cruel and/or unusual punishment.

The second prong of the *Lynch* analysis "involves a comparison of the 'challenged punishment with the punishment prescribed for more serious crimes in the same jurisdiction.' [Citation.]" (*People v. Romero* (2002) 99 Cal.App.4th 1418, 1433.) The third prong of *Lynch* calls for comparison of the California punishment with punishment for the same crimes in other states. (*People v. Romero, supra*, at p. 1433.) Defendant has not met his burden of proof on either of these prongs. (*Ibid*. [second prong inapposite to three strikes sentencing; third prong not satisfied merely because California's sentencing scheme is harsher than others].) Indeed, defendant's sentence is not disproportionate to his culpability. (See *Lockyer v. Andrade, supra,* 538 U.S. at pp. 73-74 [two consecutive terms of 25 years to life for third strike conviction involving two thefts of videotapes not cruel and unusual punishment]; *Ewing v. California, supra*, 538 U.S. at p. 21 [25-year-to-life sentence for theft of three golf clubs for habitual criminal not violative of the Eighth Amendment].) There is nothing which favorably distinguishes this case from the facts of *Andrade*, in which the Supreme Court upheld a sentence of two consecutive terms of 25 years to life for a defendant with a lengthy history of *nonviolent* crime. (*Lockyer v. Andrade, supra,* at p. 68.)

In view of the foregoing, we conclude that, as the law currently stands, defendant's life sentence does not constitute cruel and unusual punishment under both the state and federal Constitutions

III. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ King
J.

We concur:

/s/ Gaut
Acting P.J.

/s/ Miller
J.